Office-Supreme Court, U.S.
FILED
APR 11 1983
ALEXANDER L. STEVAS,
CLERK

82-1671

No. 83-

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

ITT CONTINENTAL BAKING CO., INC.,
HOSTESS CAKE DIVISION,

Petitioner,

vs.

BAKERY SALESMEN, DRIVERS,
WAREHOUSEMEN and HELPERS,
LOCAL UNION NO. 51,
affiliated with the
INTERNATIONAL BROTHERHOOD
OF TEAMSTERS, CHAUFFEURS,
WAREHOUSEMEN AND HELPERS
OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

GREGORY J. SCHROEDTER
(Counsel of Record)
ROCKFORD R. CHRASTIL
SARA M. GREEN
BELL, BOYD & LLOYD
Three First National Plaza
70 West Madison Street, Suite 3200
Chicago, Illinois 60602
(312) 372-1121

Attorneys for Petitioner

Dated: April 11, 1983

Merrill/Gunthrop Warren, Chicago • 372-2800

QUESTIONS PRESENTED

IN THE CONTEXT OF MULTIEMPLOYER BARGAINING, WHETHER A UNION MAY PURPOSELY REFRAIN FROM BARGAINING WITH RESPECT TO LOCAL ISSUES AND PRACTICES WHICH ARE NOT UNIFORM THROUGHOUT THE UNIT AND, FOLLOWING EXECUTION OF THE MULTIEMPLOYER AGREEMENT, REQUEST AN ARBITRATOR TO SET TERMS AND CONDITIONS OF EMPLOYMENT APPLICABLE TO SINGLE EMPLOYER MEMBERS THROUGH "POLICY GRIEVANCES"

IF SO, WHETHER THE UNION MAY DO SO IN THE ABSENCE OF A SHOWING OF CLEAR AND UNMISTAKABLE CONTRACT LANGUAGE EVINCING AN ACTUAL AGREEMENT BETWEEN THE PARTIES TO VEST AN ARBITRATOR WITH THE POWER TO ENGAGE IN SUCH INTEREST OR QUASI-LEGISLATIVE ARBITRATION

PARTIES TO THE PROCEEDINGS

Petitioner, ITT Continental Baking Co., Inc., Hostess Cake Division, was the Defendant-Appellee below. Respondent, Bakery Salesmen, Drivers, Warehousemen and Helpers, Local Union No. 51, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, was the Plaintiff-Appellant below.

TABLE OF CONTENTS

	PAGE
Questions Presented	i
Parties to the Proceedings	ii
Table of Authorities	v
Opinions Below	1
Jurisdiction	2
Statutory Provision Involved	2
Statement of the Case	2
1. Factual background	3
2. Proceedings below	7
Reasons for Granting the Writ	9
I. The decision below sets forth a new test for the arbitration of local disputes under a multiemployer agreement that is contrary to the *Steelworkers Trilogy* and the express provisions of the National Labor Relations Act	10
A. The decision below contravenes national labor policy	13
B. The decision below creates a loophole in Section 10(a) of the National Labor Relations Act that renders private resolution of unfair labor practices immune from scrutiny by the National Labor Relations Board	18
C. The decision below finds no support in the *Steelworkers Trilogy*	21
II. An arbitrator is without power to order changes in mandatory subjects of bargaining absent clear and unmistakable contract language	24
III. The decision below undermines the utility of multiemployer bargaining as an instrument of labor peace	27
Conclusion	31

Appendix:

App. A: Sixth Circuit opinion, November 1, 1982

App. B: District Court order and opinion dismissing plaintiff's motion for summary judgment to enforce the arbitration award and dismissing complaint without attorney fees, November 18, 1981

App. C: Sixth Circuit order denying petition for rehearing and suggestion for rehearing en banc, January 11, 1983

App. D: Sixth Circuit judgment, January 19, 1983

App. E: Award of Arbitrator Harry J. Dworkin, March 13, 1981

App. F: Designated Portions of the Record of Proceedings before Arbitrator Harry J. Dworkin, November 20, 1980

Opening Statement of Company Counsel, Mr. Schroedter

Testimony of Louis Picchi

Testimony of Robert Heiss

Joint Exhibit A

Company Exhibit 8

Company Exhibit 9

App. G: Affidavit of Jack Pfeiffer, former Company Vice-President and Director of Labor and Personnel, July 6, 1981

TABLE OF AUTHORITIES

Cases

	PAGE
Alfred M. Lewis, Inc. v. NLRB, 587 F.2d 403 (9th Cir. 1978)	15, 16, 19
Aluminum Co. of America v. UAW, 630 F.2d 1340 (9th Cir. 1980)	15
Boland Marine & Manufacturing Co., 225 N.L.R.B. 824 (1976)	15
Carey v. Westinghouse Electric Corp., 375 U.S. 261 (1964)	16, 19
Charles D. Bonanno Linen Service v. NLRB, 454 U.S. 404 (1982)	9, 16, 27
CIBA — Geigy Pharmaceuticals, 264 N.L.R.B. No. 134, 111 L.R.R.M. 1460 (1982)	16
Clyde Taylor, 127 N.L.R.B. 103 (1960)	20, 21
Dunham-Bush, Inc., 264 N.L.R.B. No. 175, 111 L.R.R.M. 1389 (1982)	15
Fibreboard Paper Products Corp. v. NLRB, 379 U.S. 203 (1964)	15
General Electric Co., 192 N.L.R.B. 68 (1971), *enforced*, 466 F.2d 1177 (6th Cir. 1972)	15
Glaziers and Glassworkers Local Union 767 (Sierra Glass Service, Inc.), 228 N.L.R.B. 35 (1977), *enforced*, 577 F.2d 100 (9th Cir. 1978)	20
H.K. Porter Co. v. NLRB, 397 U.S. 99 (1970)	18
Kroger Co., 148 N.L.R.B. 569 (1964)	17
Metropolitan Edison Co. v. NLRB, ___ U.S. ___, No. 81-1664 (April 4, 1983), No. 65 Daily Labor Reports (BNA) D-1 (April 4, 1983)	25
Murphy Diesel Co., 184 N.L.R.B. 757 (1970), *enforced*, 454 F.2d 303 (7th Cir. 1971)	15
NLRB v. Acme Industrial Co., 385 U.S. 432 (1967)	16

	PAGE
NLRB v. Burns International Security Services, Inc., 406 U.S. 272 (1972)	25
NLRB v. C & C Plywood Corp., 385 U.S. 421 (1967)	18
NLRB v. Columbus Printing Pressmen & Assistants' Union No. 252, 543 F.2d 1161 (5th Cir. 1976)	24, 25, 29
NLRB v. Everbrite Electric Signs, Inc., 562 F.2d 405 (7th Cir. 1977)	25
NLRB v. Katz, 369 U.S. 736 (1962)	15
NLRB v. Miller Brewing Co., 408 F.2d 12 (9th Cir. 1976)	15, 17
NLRB v. Perkins Machine Co., 326 F.2d 488 (1st Cir. 1964)	25
NLRB v. Plasterers' Local No. 79, 404 U.S. 116 (1971)	16
NLRB v. South Central Bell Telephone Co., 688 F.2d 345 (5th Cir. 1982)	16, 19
NLRB v. Strong, 393 U.S. 357 (1969)	16, 17
NLRB v. System Council, T-6, IBEW, 599 F.2d 5 (1st Cir. 1979)	15
Norwalk Typographical Union No. 529, 241 N.L.R.B. 310 (1979)	15
Retail Clerks Union Local 770 (Hughes Market, Inc.), 218 N.L.R.B. 680 (1975)	21
Sheet Metal Workers' International Association, Local No. 252 v. Standard Sheet Metal, Inc., 699 F.2d 481 (9th Cir. 1983)	25
Smith Cabinet Manufacturing Co., 147 N.L.R.B. 1506 (1964)	25
Smith Steel Workers (A.O. Smith Co.), 174 N.L.R.B. 235, *enforced in relevant part*, 420 F.2d 1 (7th Cir. 1969)	21

	PAGE
Sperry Systems Management Division v. NLRB, 492 F.2d 63 (2d Cir. 1974), *cert. denied*, 419 U.S. 831 (1974)	21
Spielberg Manufacturing Co., 112 N.L.R.B. 1080 (1955)	16, 21
United Steelworkers of America v. American Manufacturing Co., 363 U.S. 564 (1960)	9, 13, 21, 22, 23
United Steelworkers of America v. Enterprise Wheel and Car Corp., 363 U.S. 593 (1960)	9, 13, 21, 22, 23
United Steelworkers of America v. Warrior and Gulf Navigation Co., 363 U.S. 574 (1960)	9, 10, 13, 21, 23, 24, 26, 30
Weyerhaeuser Co., 166 N.L.R.B. 299 (1967), *enforced*, 398 F.2d 770 (D.C. Cir. 1968)	16

Statutes

28 U.S.C. §1254 (1)	2
29 U.S.C. §151	13
29 U.S.C. §158 (a)(5)	13
29 U.S.C. §158 (b)(3)	13, 18
29 U.S.C. §158 (d)	14
29 U.S.C. §160 (a)	18, 19
29 U.S.C. §173 (d)	22
29 U.S.C. §185 (a)	2, 7

Other Authorities

	PAGE
D. BOK and J. DUNLOP, LABOR AND THE AMERICAN COMMUNITY (1970)	29
Brown, *Management Rights and the Collective Agreement*, in PROCEEDINGS OF THE FIRST ANNUAL MEETING OF THE INDUSTRIAL RELATIONS RESEARCH ASSOCIATION (1949) . .	12
WM. CHERNISH, COALITION BARGAINING (1969).	28
COX, *Reflections Upon Labor Arbitration*, 72 HARV. L. REV. 1482 (1959)	10, 12
Goldberg, *Management's Reserved Rights: A Labor View*, in MANAGEMENT RIGHTS AND THE ARBITRATION PROCESS, PROCEEDINGS OF THE NINTH ANNUAL MEETING OF THE NATIONAL ACADEMY OF ARBITRATORS (BNA 1956)	11

No. 83-

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

ITT CONTINENTAL BAKING CO., INC.,
HOSTESS CAKE DIVISION,

Petitioner,

vs.

BAKERY SALESMEN, DRIVERS,
WAREHOUSEMEN and HELPERS,
LOCAL UNION NO. 51,
affiliated with the
INTERNATIONAL BROTHERHOOD
OF TEAMSTERS, CHAUFFEURS,
WAREHOUSEMEN AND HELPERS
OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Petitioner, ITT Continental Baking Co., Inc., Hostess Cake Division, respectfully prays that a writ of certiorari issue to review the opinion and judgment of the United States Court of Appeals for the Sixth Circuit, entered in this proceeding on November 1, 1982, and January 19, 1983, respectively.

OPINIONS BELOW

The opinion of the court of appeals is reported at 692 F.2d 29 (6th Cir. 1982) and appears as Appendix A hereto. The decision of the district court is unreported; it appears as Appendix B hereto.

JURISDICTION

The opinion of the court of appeals on the merits was entered on November 1, 1982 (App. A). A timely Petition for Rehearing and Suggestion for Rehearing En Banc was denied on January 11, 1983 (App. C). Judgment was entered on January 19, 1983 (App. D). Jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1) (1976).

STATUTORY PROVISION INVOLVED

Section 301(a) of the Labor Management Relations Act of 1947, as amended, 29 U.S.C. §185(a), provides in pertinent part:

> Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

STATEMENT OF THE CASE

At issue in this case is whether an employer's agreement to bargain with a union as a part of a multiemployer bargaining unit permits the union purposely to refrain from bargaining with respect to local practices affecting only individual employer members of the unit and, following execution of the multiemployer agreement, request an arbitrator to set terms and conditions of employment for single employer members through "policy grievances."

1. Factual Background

Bakery Salesmen, Drivers, Warehousemen and Helpers, Local Union No. 51 (hereinafter "the Union"), is a labor organization which represents approximately 100 driver salesmen employed by the Detroit cake plant of the Hostess Cake Division of ITT Continental Baking Company, Inc. (hereinafter "the Company")(App. A 2-3). The Union also represents driver salesmen employed by the Detroit bread plant of the Wonder Bread Division of ITT Continental Baking Company, Inc., and driver salesmen employed by the Detroit plant(s) of American Bakeries, Inc., one of the Company's competitors.

At all times material herein the Company, Continental's Detroit bread plant, and the Detroit plant(s) of American Bakeries, bargained jointly with the Union (App. F 5). The end result of these multiemployer negotiations was a collective bargaining agreement setting forth the wages, hours, and other terms and conditions of employment of the driver-salesmen (App. F 5).

The multiemployer agreement at issue here, signed separately by each employer noted above, including the Company, was effective October 6, 1979, to October 3, 1982 (App. F 16). It contained a grievance-arbitration clause providing in pertinent part as follows (App. F 22-23):

> **ARTICLE XXIII — ARBITRATION**
>
> *Section 1. Grievance Procedure*
>
> a. It is agreed that, should any charge of violation of this Agreement, charge of discrimination, grievance or dispute arise between the parties hereto, such matter must be taken up within ten (10) days of the alleged occurrence or it shall be deemed waived. The parties

shall make an earnest effort to settle such controversy amicably, but if they fail to do so it shall be submitted to arbitration as provided below.

* * *

c. During such proceedings, there shall be no lockout, strike, or stoppage of work and the decision of said neutral party or Arbitrator shall be final and binding upon both parties hereto.

* * *

Section 4. Disputes Over Renewal Agreements

The above mentioned procedure shall not apply to any disputes arising out of negotiations of any subsequent Agreement.

a. The dispute giving rise to arbitration

The Company employs driver salesmen (hereinafter sometimes referred to as "drivers") represented by the Union to deliver its products to retail outlets (App. E 2-3). As part of their duties, driver salesmen are required to collect monies from certain customers along their routes (App. E 3) and to follow a check-in procedure to account for all monetary transactions at the end of the day (App. E 3, 11). Under the Company's check-in procedure, drivers are required to deposit daily, in a Company safe, envelopes containing monies received for delivery of products to customers together with deposit tickets (App. E 3-5, 12). Envelopes are thereafter collected by an armored car service, turned over to the Company's bank, and tallied by employees of the bank (App. E 5, 12). Drivers are required to reimburse the Company for any shortages reported between the contents of their deposit envelopes and their deposit slips (App. E 6). Conversely, drivers are credited with any overages reported (App. E 6).

The Company's check-in procedure and system of collection described above has been in existence for eighteen to twenty-one years (App. E 2, 12). In the several years prior to negotiation of the 1979 multiemployer bargaining agreement, the Union filed a number of grievances alleging that drivers had been incorrectly charged with shortages due to bank error or misplacement of envelopes after their removal from the safe (App. E 7, 12-13).[1] The Union met with Company representatives on several occasions in the course of processing these grievances for the purpose of discussing a modification in the Company's check-in procedure (App. F 6-8). The Company declined to agree to any modification in these discussions (App. E 15).

Thereafter, during the 1979 multiemployer negotiations, the Union presented no contract proposals seeking to modify the Company's check-in procedure (App. F 5-9, 14-15). On February 6, 1980, four months following the effective date of the 1979-1982 bargaining agreement, the Union filed a "policy grievance" against the Company seeking to alter the established check-in procedure (App. E 6-7). The Union's grievance sought an award requiring the Company to assign a representative to tally the funds contained in each driver's envelope, and to verify the same either by issuing a receipt or initialing the driver's daily cash and check record (App. E 11).

---

[1] Those grievances were limited to challenging application of the check-in procedure in individual cases and were not directed to challenging the Company's right to adhere to such procedure and practice as an established term and condition of employment (App. E 7, 12-13). Indeed, in the settlement of a grievance entered into between the Company and the Union in May, 1977, it was expressly agreed that the Company maintained the right to adhere to the money check-in procedure and to require drivers to accept responsibility for properly recording and depositing monies collected by them (App. E 12-14; App. F 11-14, 24-28).

b. The arbitrator's award

The Union demanded that an arbitrator be selected to hear and decide its "policy grievance." Pursuant to the parties' 1979-1982 collective bargaining agreement, an arbitrator was selected and a hearing was scheduled for November 20, 1980 (App. F 1). At the arbitration hearing, the Company contested the arbitrability of the Union's "policy grievance" (App. F 2).

In an award dated March 13, 1981, the arbitrator found that the Company's check-in procedure "had been in effect and had remained unchallenged for at least as long as twenty-one years", and that the Union "had never attempted to. . . effect a change in the existing procedure at the bargaining table" (App. E 15). In these circumstances, the arbitrator acknowledged that the grievance was "in the nature of an interest dispute" (App. E 9, 15); that is, the Union sought to effectuate a totally new check-in procedure or method of operation through arbitration rather than through collective bargaining. He nevertheless found the relief requested by the Union within his power to grant because the Union did not

seek to excise a written contract term, but rather sought to alter a term and condition of employment "not covered" by the agreement (App. E 8-9).[2]

2. Proceedings Below

The Union commenced this action in the United States District Court for the Eastern District of Michigan pursuant to Section 301(a) of the Labor Management Relations Act of 1947, as amended, 29 J.S.C. §185(a), seeking to enforce the arbitration award. The district court dismissed the suit. In pertinent part the court concluded that the traditional rights arbitration clause contained in the parties' collective bargaining agreement did not authorize the arbitrator to engage in the extraordinary tactic of "interest arbitration," thereby altering an established Company procedure and practice

---

[2] In pertinent part, the award provided (App. E 19-20):

I.

The check-in procedure relating to driver salesmen at the two distribution centers (Troy and Livonia, Michigan) shall be modified so as to require that a representative of management be present during times that driver salesmen check in, and be required to count the contents of their envelopes, and compare same with the amounts recorded on the daily settlement sheet;

II.

After such verification, the driver salesman shall be issued a receipt for the contents of the envelope, or, such verification may be noted on the driver's "pink slip" by affixing the date, and initials of the person making the verification;

* * * *

IV.

The Arbitrator will retain jurisdiction for a period of six (6) months from date of this Award; either party may, prior to the expiration of said six-month period make a written request for reconsideration, review, or modification of the foregoing Award;

V.

In event such request is filed, the Arbitrator will consider in addition to the evidence heretofore presented such new evidence as relates to the operation of the check-in procedure pursuant to this Award.

applicable to unit employees and substituting a new procedure and practice in derogation of the traditional collective bargaining process (App. B 5, 6-7).

On appeal, a panel of the Sixth Circuit Court of Appeals rejected the district court's analysis. In the Sixth Circuit's view, grievances pressed under a multiemployer contract against a single unit employer raise "local disputes" which "need to be resolved by arbitration since the issues are unlikely to be addressed at the bargaining table" (App. A 8). In these circumstances, the Court adopted an eight-prong test to determine whether an arbitration clause includes a dispute concerning company policy in the context of a multiemployer contract. That test turns on the application of the following eight factors (App. A 8-9):

> (1) the language of the arbitration clause; (2) the language of the no-strike clause; (3) the language of any management rights clause; (4) how directly the company policy in question affects employee working conditions and morale; (5) how directly the policy affects the company's profit structure and stockholders; (6) whether the dispute in question is industry-wide or limited to one employer; (7) the course of any contract negotiations concerning the disputed policy; and (8) whether any substantive provisions of the contract tend to support or negate the policy in question.

Applying these factors to the instant proceeding, the court concluded that the arbitration clause properly vested the arbitrator with authority to alter the Company's check-in procedure, thereby permitting the arbitrator to assume the responsibility for managing the Company's operations with respect to its money collection system (App. A 9).

REASONS FOR GRANTING THE WRIT

"Multiemployer bargaining has continued to be the preferred bargaining mechanism in many industries, and as *Buffalo Linen* predicted, it has raised a variety of problems requiring resolution." *Charles D. Bonanno Linen Service v. NLRB*, 454 U.S. 404, 410 (1982). In *Bonanno Linen*, the problem requiring resolution was the rights of unions and employers to terminate the multiemployer bargaining arrangement. Here, the problem requiring resolution is no less critical and concerns the duty to bargain vis-a-vis the duty to arbitrate with respect to local issues arising in the multiemployer bargaining context. As noted, the decision below set forth an eight factor test for deciding when an arbitration clause encompasses a dispute concerning a company policy in the multiemployer context. This eight factor test allows an arbitrator to ignore the role and function of past practice in the administration of collective bargaining agreements, contrary to the mandate of the *Steelworkers Trilogy*;[3] it allows an arbitrator to "dispense his own brand of industrial justice" (*Steelworkers v. Enterprise Wheel*, 363 U.S. at 597) and force upon an employer a mid-term contract change without the employer's consent, contrary to the *Steelworkers Trilogy* and the express provisions of the National Labor Relations Act; and it undermines the utility of multiemployer bargaining as an instrument of labor peace.

---

[3] *United Steelworkers of America v. American Mfg. Co.*, 363 U.S. 564 (1960); *United Steelworkers of America v. Warrior and Gulf Navigation Co.*, 363 U.S. 574 (1960); *United Steelworkers of America v. Enterprise Wheel and Car Corp.*, 363 U.S. 593 (1960).

I. THE DECISION BELOW SETS FORTH A NEW TEST FOR THE ARBITRATION OF LOCAL DISPUTES UNDER A MULTIEMPLOYER AGREEMENT THAT IS CONTRARY TO THE *STEELWORKERS TRILOGY* AND THE EXPRESS PROVISIONS OF THE NATIONAL LABOR RELATIONS ACT

Past practice plays a significant role in the administration of the collective bargaining agreement. As Justice Douglas stated in *Steelworkers v. Warrior and Gulf*, 363 U.S. at 581-582:

> The labor arbitrator's source of law is not confined to the express provisions of the contract, as the industrial common law — the past practices of the industry and the shop — is equally a part of the collective bargaining agreement although not expressed in it.

Ever since *Warrior and Gulf*, past practice has become one of the most useful and hence one of the most commonly used aids in resolving grievance disputes. It can help the arbitrator in a variety of ways in interpreting the agreement. It may be used to clarify what is ambiguous, and/or give substance to what is general. It may also, apart from any basis in the agreement, be used to establish a separate, enforceable condition of employment.

The reason that past practice often constitutes a separate, enforceable condition of employment is that the parties cannot set down on paper the whole of their agreement. "One cannot reduce all the rules governing a community like an industrial plant to fifteen or even fifty pages." Cox, *Reflections Upon Labor Arbitration*, 72 HARV. L. REV. 1482, 1499 (1959); *quoted with approval in Steelworkers v. Warrior and Gulf*, 363 U.S. at 579 n. 6.

Thus, a collective bargaining agreement includes not just the written provisions stated therein; it also includes the understandings and mutually accepted practices which have developed over the years.[4] Because the contract is executed in the context of these understandings and practices, the negotiators must be presumed to be fully aware of them and to have relied upon them in striking their bargain. Hence, if a particular practice is not repudiated during negotiations, it may fairly be said that the contract was entered into upon the assumption that the practice would continue in force. By

---

[4] In a paper delivered at the ninth annual meeting of the National Academy of Arbitrators held in Cleveland, Ohio on January 26-28, 1956, Arthur J. Goldberg, then General Counsel, United Steelworkers of America, stated:

> The real question that arises is, what is the deal? Is it the contract or something more? I cannot agree that the deal includes the acceptance of the pre-union past as a guide for the future. But the practices which grow up during decades of a collective bargaining relationship cannot be swept aside. They have weight which must be measured in the specific case in the light of many factors. These practices, grievance settlements, understandings, etc., inevitably represent the set of circumstances which formed the back drop of the negotiation of the current agreement. Since every matter involving wages, hours, and working conditions is a matter to be determined by collective bargaining — and if this is not so then just what is collective bargaining? — then it is reasonable to assume that the contract is made in the light of the present circumstances. To the extent that present conditions and methods for change are not revised, they are accepted.

Goldberg, *Management's Reserved Rights: A Labor View*, in MANAGEMENT RIGHTS AND THE ARBITRATION PROCESS, PROCEEDINGS OF THE NINTH ANNUAL MEETING OF THE NATIONAL ACADEMY OF ARBITRATORS 118, 126 (1956).

their silence, the parties have given assent to "existing modes of procedure."[5] In this way, practices become an integral part of the contract.[6]

The decision of the court below, however, freely sanctions arbitrators to ignore the common law of the shop in the administration of collective bargaining agreements entered

---

[5] Brown, *Management Rights and the Collective Agreement*, in PROCEEDINGS OF THE FIRST ANNUAL MEETING OF THE INDUSTRIAL RELATIONS RESEARCH ASSOCIATION 145, 155 (1949). Brown expressed his analysis in these words:

> But when all of the provisions are written, it will be found that many matters which affect conditions of employment are not specifically referred to. Does this mean that these matters are of no concern to the parties, or that the agreement has no meaning with respect to them? I think not. On some of these matters, the parties are satisfied with existing modes of procedure, consciously or unconsciously. On others, one party or the other may be dissatisfied but may be unable to devise better modes. On still others, one party may have preferred an alternative but may have been unable to secure agreement from the other party, or may have been unwilling to pay the price necessary for acceptance. In any event, the omission of specific reference is significant.
>
> [T]he agreement, no matter how short, does provide a guide to modes of procedure and to the rights of the parties on all matters affecting the conditions of employment. Where explicit provisions are made, the question is relatively simple. But even where the agreement is silent, the parties have, by their silence, given assent to a continuation of the existing modes of procedure.

[6] Cox not only agrees with this view but states it more strongly. In asserting that the words of the contract cannot be the exclusive source of rights and duties, he emphasizes the following point:

> Within the sphere of collective bargaining, the institutional characteristics and the governmental nature of the collective bargaining process demand a common law of the shop which implements and furnishes the context of the agreement. We must assume that intelligent negotiators acknowledged so plain a need unless they stated a contrary rule in plain words.

Cox, *supra* p. 10, at 1499.

The common law of the shop would include, at the very least, long-standing practices in the plant.

into in the context of multiemployer bargaining. In the court's view, disputes over the continued application of local shop practices — those applicable only to individual employer members of the multiemployer unit — are not subject to resolution through multiemployer bargaining. Accordingly, in the context of multiemployer bargaining, an agreement to arbitrate vests an arbitrator with the power to ignore established past practice and alter existing local procedures and practices during the term of the contract. In other words, in the absence of a written contract provision establishing the rights and obligations of the parties with respect to local practices, the court concluded that peaceful resolution of labor disputes requires that "interest arbitration" be substituted for the process of collective bargaining.

It is apparent that the court's decision undermines the role and function of past practice in labor arbitration. Of even more concern, the decision vests arbitrators in private proceedings with power to modify or change company procedures and practices affecting conditions of employment which have never been the subject of collective bargaining. Such a result directly contravenes national labor policy as set forth in the National Labor Relations Act; and is nowhere sanctioned by the decisions of this Court in the *Steelworkers Trilogy*.

A. The decision below contravenes national labor policy

The statutory right and obligation of employers and unions to bargain collectively is protected by the National Labor Relations Act (NLRA)[7] and lies at the heart of national

[7] 29 U.S.C. §151 et seq. See specifically sections 8(a)(5) and 8(b)(3) of the NLRA, 29 U.S.C. §§ 158(a)(5) and (b)(3) respectively.

policy governing labor management relations. The obligation to bargain, however, does not include the obligation to agree. Section 8(d) of the NLRA, 29 U.S.C. §158(d), provides:

> [T]o bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, *but such obligation does not compel either party to agree to a proposal or require the making of a concession.* (emphasis added).

In accordance with these fundamental principles, it is well settled that both employers and unions alike violate the duty to bargain where they seek unilaterally to impose changes in established terms and conditions of employment, including long-standing procedures and practices, during the term of an

existing contract.[8] Further, the duty to bargain is *not* satisfied by the parties' submission of the dispute to arbitration.[9] On the contrary, arbitration of grievances is a procedure distinct from collective bargaining and an arbitrator has no

---

[8] *Alfred M. Lewis, Inc. v. NLRB*, 587 F.2d 403, 408-409 (9th Cir. 1978) (employer violated 8(a)(5) by instituting new production quotas and a new disciplinary system without bargaining); *NLRB v. Miller Brewing Co.*, 408 F.2d 12, 14-16 (9th Cir. 1976); *Boland Marine & Mfg. Co.*, 225 N.L.R.B. 824 (1976); *General Electric Co.*, 192 N.L.R.B. 68, 72 (1971), *enforced*, 466 F.2d 1177 (6th Cir. 1972); *Murphy Diesel Co.*, 184 N.L.R.B. 756 (1970), *enforced*, 454 F.2d 303,304, 307 (7th Cir. 1971); *Dunham-Bush, Inc.*, 264 N.L.R.B. No. 175, 111 L.R.R.M. 1389, 1390 n. 4 (1982); *NLRB v. System Council, T-6, IBEW*, 599 F.2d 5, 6-8 (1st Cir. 1979) (union violated 8(b)(3) by unilaterally adopting an internal union rule in derogation of existing shop practice recognized by parties' contract); *Norwalk Typographical Union No. 529*, 241 N.L.R.B. 310, 313-315 (1979).

See generally NLRB v. Katz, 369 U.S. 736, 743 (1962) (employer violates 8(a)(5) when, absent union waiver, it changes employees' terms and conditions of employment without giving the union an opportunity to bargain about the change); *Fibreboard Paper Products Corp. v. NLRB*, 379 U.S. 203, 209-210 (1964).

[9] *Alfred M. Lewis, Inc. v. NLRB*, 587 F.2d at 408; *Aluminum Co. of America v. UAW*, 630 F.2d 1340, 1344 (9th Cir. 1980).

jurisdiction to resolve for the parties those issues that are required by statute to be resolved through the process of collective bargaining.[10]

The decision of the court below, however, permits an arbitrator acting under a multiemployer bargaining agreement to resolve for the parties local issues that are required by statute to be resolved through the process of collective bargaining. Such a fundamental encroachment of an employer's statutory right to bargain finds no justification in national labor policy respecting multiemployer bargaining.

A multiemployer unit is created upon the mutual consent of a union and a group of employers to be bound in future collective bargaining through group rather than individual bargaining. *Weyerhaeuser Co.*, 166 N.L.R.B. 299 (1967), *enforced*, 398 F.2d 770 (D.C. Cir. 1968), *cited with approval* in *Bonanno Linen*, 454 U.S. at 420 (concurring opinion of Justice Stevens). Upon formation of a multiemployer unit,

---

[10] It is well settled that the NLRB retains independent jurisdiction to remedy unfair labor practices and that the NLRB's ruling takes precedence in the event of irreconcilable conflict with the terms of an arbitrator's award. *Carey v. Westinghouse Electric Corp.*, 375 U.S. 261, 271-272 (1964); *NLRB v. Strong*, 393 U.S. 357, 360-361 (1969); *NLRB v. Acme Industrial Co.*, 385 U.S. 432, 438 (1967).

Accordingly, while the NLRB may, in the exercise of its jurisdiction, defer to an arbitrator's award, it is not required to do so and will not do so where the award is "clearly repugnant" to the purposes and policies of the Act. *Spielberg Manufacturing Co.*, 112 N.L.R.B. 1080, 1082 (1955), *cited with approval* in *NLRB v. Plasterers' Local No. 79*, 404 U.S. 116, 136-137 (1971); *NLRB v. South Central Bell Telephone Co.*, 688 F.2d 345, 350 (5th Cir. 1982).

In accordance with these principles, the NLRB will not defer to arbitral awards upholding an employer's unilateral promulgation of policies and work rules where the statute requires such issues to be resolved by collective bargaining. *See, e.g., CIBA-Geigy Pharmaceuticals*, 264 N.L.R.B. No. 134, 111 L.R.R.M. 1460, 1461 (1982); *Alfred M. Lewis, Inc. v. NLRB*, 587 F.2d at 407-408.

the same rights and obligations attach to an employer member of the collective unit as attach to a single employer under the NLRA. This includes the right and obligation to bargain over all mandatory subjects of bargaining.[11]

Admittedly, the National Labor Relations Board (NLRB) has long recognized the exigencies of multiemployer bargaining. Thus, the NLRB early noted that the interests and problems of employers who consent to be bound in multiemployer bargaining are not uniform throughout the unit, and that resolution of local issues may not be possible in multiemployer negotiations.[12] However, the practicalities of multiemployer bargaining do *not* affect the statutory right of employers to resolve local issues through collective bargaining. On the contrary, the statute *requires* collective bargaining with respect to local issues that are not raised in multiemployer negotiations.[13] To that end, the NLRB has long sanctioned individual bargaining between unions and individual employer members of the unit with respect to local issues and has held such individual bargaining fully consistent with the duty to bargain in a multiemployer unit.[14]

In derogation of an employer's statutory rights, the test adopted by the court below on its face sanctions the use of arbitration under multiemployer bargaining agreements in a manner which is contrary to the NLRA. To repeat, the decision encroaches on an employer's statutory right to resolve

---

[11] *NLRB v. Miller Brewing Co.*, 408 F.2d at 14-16; *see generally NLRB v. Strong*, 393 U.S. 357 (1969).

[12] *Kroger Co.*, 148 N.L.R.B. 569 (1964).

[13] *NLRB v. Miller Brewing Co.*, 408 F.2d at 14-16 (under 8(a)(5) individual employer member of multiemployer bargaining unit obligated to bargain with union over issuance of new local plant rules following negotiation of multiemployer agreement which made no provision for issuance of plant rules).

[14] *Kroger Co.*, 148 N.L.R.B. at 573.

local issues through the process of collective bargaining contrary to rights guaranteed by Section 8(b)(3) of the NLRA.[15] Further, the decision grants arbitrators an unlimited power to compel agreement on local issues, contrary to the statutory mandate contained in Section 8(d) of the NLRA that the obligation to bargain "does not compel either party to agree to a proposal or require the making of a concession."[16] For these reasons alone, the decision should not be permitted to stand.

B. The decision below creates a loophole in Section 10(a) of the NLRA that renders private resolution of unfair labor practices insulated from scrutiny by the NLRB

Section 10(a) of the NLRA, 29 U.S.C. § 160(a), declares in relevant part:

> The Board is empowered...to prevent any person from engaging in any unfair labor practices.... This power shall not be affected by

---

[15] Indeed, as the District Court observed (App. B 7):

> The interpretation given by the arbitrator would result in the company being subject to binding arbitration on every management decision that was not expressly covered by the contract and which the union sought to modify. The only way that management could establish policy would be to specifically include it in the agreement, otherwise the policy would be subject to an arbitrable decision on whether it was "fair, reasonable and practical" to modify it if so requested by the union. *To receive this benefit all the union would need do is refrain from bargaining or negotiating regarding the policy. It seems to us that this is contrary to the collective bargaining process.* (emphasis added).

[16] Indeed, as this Court has recognized, not even the NLRB — acting in furtherance of its superior statutory authority to prevent the commission of unfair labor practices — retains power to dictate what terms and conditions of employment should be contained in the parties' labor agreement. *H. K. Porter v. NLRB*, 397 U.S. 99 (1970); *See also NLRB v. C & C Plywood Corp.*, 385 U.S. 421 (1967).

> any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise.

In accordance with Section 10(a), it is well settled that the jurisdiction of an arbitrator to enforce private contract rights cannot defeat the jurisdiction of the NLRB to enforce public statutory rights.[17]

In *Carey* v. *Westinghouse*, this Court considered the proper accommodation to be reached under conflicting labor policies when a dispute arguably within the jurisdiction of an arbitrator's authority presents a dispute equally cognizable by the NLRB as an unfair labor practice. The Court held that Section 10(a) of the NLRA need not preclude submission by a union of a dispute to arbitration in such circumstances because the "superior authority of the [NLRB may] be invoked at anytime" by an employer to redress a violation of statutory rights and because the NLRB's ruling "would, of course, take precedence" in the event of irreconcilable conflict with the terms of an arbitrator's award. 375 U.S. at 272.

For this reason, it is well settled that a union retains a separate and independent right to invoke the jurisdiction of the NLRB to challenge an employer's unilateral changes in mandatory subjects of bargaining upheld by the terms of an arbitrator's award. An employer may *not* avoid an unfair labor practice charge by claiming that the parties have agreed to submit to the terms of a final and binding arbitration award. As explained by the Ninth Circuit, it would "wholly undercut the duty to bargain if the employer were allowed to act with reference to a mandatory bargaining subject and then simply defend its actions in an arbitration hearing." *Alfred M. Lewis v. NLRB*, 587 F.2d at 408.

---

[17] *Carey v. Westinghouse Electric Corp.*, 375 U.S. at 271-272; *See also NLRB v. South Central Bell Telephone Co.*, 688 F.2d at 349-350.

Unions stand, however, in a fundamentally different posture from employers with respect to setting terms and conditions of employment applicable to unit employees. While an employer — who provides employment and directs the workforce — possesses the inherent power unilaterally to set working conditions, a union retains no such inherent power. Rather, the statute secures to unions the right to bargain to improve those conditions; the right to exercise their economic strength through strikes or picketing in support of their bargaining demands; and the right to enforce any agreement incorporated in a written contract.

In the instant proceeding, the Union never attempted to secure alteration of a Company procedure and practice of twenty-one years' duration through the exercise of its statutory rights. It therefore decided to utilize the putative contract power of an arbitrator to compel the Company's agreement to a new check-in procedure.[18] The arbitrator ordered promulgation of a new check-in procedure, which the Union then sought to enforce by means of a Section 301 suit.

In these circumstances, an employer's ability to challenge such action as an unfair labor practice is uncertain. The NLRB has consistently held that, despite the coercive effect on statutory rights, the mere filing of a civil suit cannot be found to be an unfair labor practice. *Glaziers and Glassworkers Local Union 767 (Sierra Glass Service, Inc.)*, 228 N.L.R.B. 35, 41 (1977), *enforced*, 577 F.2d 100, 103 (9th Cir. 1978), and cases cited therein. The rationale for such holdings was set forth in *Clyde Taylor*, 127 N.L.R.B. 103, 109 (1960), wherein the NLRB stated that it "should accommodate its enforcement of the NLRA to the right of all persons to litigate

---

[18] The Union had no inherent power unilaterally to order this change. Accordingly, in sharp contrast to an employer, the Union here did not act first and defend its actions later through arbitration.

their claims in court, rather than condemn the exercise of such right as an unfair labor practice." In accordance with the rationale set forth in *Clyde Taylor*, the NLRB has declined to hold that a suit to confirm an arbitrator's award or to compel arbitration may be the subject of an unfair labor practice. *E.g.*, *Retail Clerks Union, Local 770*, 218 N.L.R.B. 680, 682-683 (1975); *Smith Steel Workers (A.O. Smith Co.)*, 174 N.L.R.B. 235, 241, *enforced in relevant part*, 420 F.2d 1, 9 (7th Cir. 1969). *But see Sperry Systems Management Division v. NLRB*, 402 F.2d 63 *(2d Cir. 1974)*.

The decision of the court below permits a union to secure a change in established terms and conditions of employment in the context of multiemployer bargaining without complying with the statutory duty to collectively bargain over such change. Because the decision permits the union to obtain such a change through arbitration and civil suit, it is questionable whether the union's conduct states an unfair labor practice cognizable by the NLRB under its current policy. In these circumstances, if the court's decision is permitted to stand, an arbitrator may well be vested with final authority to sanction unfair labor practices contrary to the express terms of Section 10(a) of the NLRA. This Court should not permit the lower court to adopt a test which allows unions to act in derogation of an employer's statutory right to bargain and at the same time to escape review of its conduct by the NLRB under the provisions of the NLRA.

C. The decision below finds no support in the *Steelworkers Trilogy*

Private settlement of labor disputes by a method agreed upon by the parties similarly lies at the heart of national policy governing labor management relations. Specifically, in the *Steelworkers Trilogy*, this Court endorsed arbitration as a forum — independent and additional to the NLRB — in

which to seek redress of labor disputes. The Court observed, however, that an arbitrator's authority and power to resolve private contract disputes must accord with the fundamental aims of national labor policy. In the Court's view, that policy lies in Section 203(d) of the Labor Management Relations Act of 1947, as amended, 29 U.S.C. § 173(d). That section provides:

> Final adjustment by a method agreed upon by the parties is hereby declared to be the desirable method for settlement of grievance disputes *arising over the application or interpretation of an existing collective bargaining agreement.* (emphasis added).

Nowhere in the *Steelworkers Trilogy* did the Court hold, nor did it suggest, that execution of an agreement to arbitrate contract labor disputes vests arbitrators in private proceedings with power to compel agreement to conditions of employment which have never been the subject of collective bargaining and which is otherwise contrary to national labor policy. Indeed, the Court cautioned that an arbitrator's function is confined to an interpretation and application of the collective bargaining agreement. 363 U.S. at 597. Further, his source of law is both defined and delimited by the express provisions of the contract and the practices of the shop which are "equally a part of the collective bargaining agreement although not expressed in it." 363 U.S. at 581-582. Finally, his award is legitimate only so long as it "draws its essence" from such contract provisions and shop practices; "he does not sit to dispense his own brand of industrial justice." 363 U.S. at 597.

The decision below freely sanctions arbitrators who rule on contract disputes in the context of multiemployer collective bargaining agreements to modify or change procedures or practices of individual employer members of the unit based

on the arbitrator's "own brand of industrial justice." This is strikingly apparent on the facts of the instant proceeding. The arbitrator acknowledged, and the court below accepted his findings, that the Company's procedure and practice respecting the reporting of funds by drivers had been in effect for eighteen to twenty-one years and had never been altered through mutual agreement of the parties. Moreover, the very terms of the award reveal that the arbitrator's promulgation of a new check-in procedure in no wise reflected an agreement of the parties.[19]

The *Steelworkers Trilogy* was not intended to permit the displacement of the critical role played by collective bargaining in the formation of contract terms and local practices which define the terms and conditions of employment applicable to unit employees. As noted above, no justification exists to expand the role of arbitration, as defined in the

---

[19] In this regard, even the arbitrator noted several potential problems in the operation of the new check-in procedure. First, "additional time may be involved in recounting the contents of the envelopes, estimated at some six minutes for each driver salesman, for approximately forty employees at each of the two distribution centers." He further noted that the added time would form an "additional burden in the form of 'waiting time' assumed by driver salesmen"; however, he presumed that no additional compensation would be required to be paid to driver salesmen inasmuch as they are paid on a commission basis only. In these circumstances, the arbitrator speculated that the Company's additional cost "would be limited to the services of one, or more Company representatives during the period required to verify the contents of the envelopes" (App. E 16).

The arbitrator's observations constitute a tacit recognition that such problems are appropriately resolved through collective bargaining rather than through arbitration. Here, the arbitrator acted unguided by any agreed-upon standards to be applied in determining local terms and conditions of employment. In place of such agreed-upon standards, he substituted a general standard of "fairness and equity." To permit an arbitrator to exercise power to determine local terms and conditions of employment where he lacks understanding and sympathy for major decisions concerning the workplace serves to aggravate rather than to diminish peaceful resolution of labor disputes. See *infra* 29.

Steelworkers Trilogy, merely because the union has negotiated with the employer as part of a multiemployer bargaining unit. Indeed, such a result is repugnant to the purpose and policy of the NLRA.

II. AN ARBITRATOR IS WITHOUT POWER TO ORDER CHANGES IN MANDATORY SUBJECTS OF BARGAINING ABSENT CLEAR AND UNMISTAKABLE CONTRACT LANGUAGE

In the instant case the arbitrator found, and the court did not reject his finding, that the Union's policy grievance was "in the nature of an interest dispute" (App. E 9). That is, the Union sought to delegate to an arbitrator the power to alter a long-standing Company procedure and practice that is "equally a part of the agreement though not expressed in it." 363 U.S. at 581-582.

Under a scheme of true interest arbitration, the parties delegate to an outsider the final decision on what terms their contract will contain. *NLRB v. Columbus Printing Pressmen & Assistants' Union No. 252*, 543 F.2d 1161, 1169 (5th Cir. 1976).[20] Thus, interest arbitration delegates power to an arbitrator to legislate contract terms, not merely to adjudicate rights under existing contract terms. As such, interest arbitration effects a profound change in the nature of collective bargaining contemplated under the NLRA, for the parties agree to substitute the decision of an arbitrator for "the precise bargain the parties would have struck had the parties' economic power been exerted against each other." As the Fifth Circuit has observed:[21]

> This situation runs counter to a basic premise of the [NLRA] — that the cause of industrial

---

[20] Typically, interest arbitration is limited to resolving disputes arising over the renegotiation of contracts, it is not invoked during the term of an existing contract to modify terms and conditions of employment.

[21] *NLRB v. Columbus Printing Pressmen*, 543 F.2d at 1170.

> peace is best served when 'the balance of bargaining advantage [is] set by economic power realities.' *NLRB v. Burns International Security Services, Inc.*, 406 U.S. 272, 92 S. Ct. 1571, 1582, 32 L.Ed.2d 61, 73 (1972).

It is true that interest arbitration agreements are not wholly unenforceable. Parties *may* agree to interest arbitration where they think it is mutually advantageous and, where such agreement exists, the parties are entitled to enforce arbitration to resolve contract terms involving mandatory subjects of bargaining.[22] However, an agreement to engage in interest arbitration is, in the truest sense, an agreement to waive the statutorily protected right to resolve contract terms involving mandatory subjects of bargaining through the process of collective bargaining. The NLRB has long held that a waiver of statutory rights is not to be lightly imputed.[23] Rather, because a provision protecting a statutory right "would normally be implied in an agreement by operation of the [NLRA] itself," that protection is waived only by "clear and unmistakable" contract language. *NLRB v. Perkins Machine Co.*, 326 F.2d 488, 489 (1st Cir. 1964); *Metropolitan Edison Co.* v. *NLRB*, — U.S. —, No. 81-1664 (April 4, 1983), No. 65 Daily Labor Reports (BNA), D-1, D-5, and cases cited in n. 12 therein (April 4, 1983).

As noted, *supra*, attempts to invoke grievance-arbitration machinery to secure unilateral changes in past practices during the life of an existing contract are violative of the NLRA.[24]

---

[22] *See, e.g., NLRB v. Columbus Printing Pressmen*, 543 F.2d at 1171; *Sheet Metal Workers Int'l Ass'n, Local 252 v. Standard Sheet Metal, Inc.*, 699 F.2d 481, 483 (9th Cir. 1983).

[23] *See, e.g., Smith Cabinet Mfg. Co.*, 147 N.L.R.B. 1506, 1507-1508, n. 2 (1964); *NLRB v. Everbrite Electric Signs, Inc.*, 562 F.2d 405, 407-408 (7th Cir. 1977).

[24] See cases cited *supra*, n. 10.

Stated otherwise, the mere existence of a standard grievance-arbitration provision does not constitute a clear and unambiguous agreement to waive the statutorily protected right to bargain, and to commit to the authority of an arbitrator the power to determine what changes should be effected in mandatory subjects of bargaining.

The arbitrator below found that interest disputes were within his power to resolve under contract language providing for arbitration of "any charge of violation of this Agreement, charge of discrimination, grievance or disputes [which] arise between the parties hereto...." The court below endorsed the arbitrator's finding based on its view that — in the context of multiemployer bargaining — disputes affecting only a single unit employer raise local issues that "need to be resolved by arbitration since the issues are unlikely to be addressed at the bargaining table" (App. A 8).

The perceived practicalities of multiemployer bargaining are no substitute for a court's duty, under the *Trilogy*, to examine whether the parties agreed to submit the dispute to arbitration. See *Steelworkers v. Warrior & Gulf*, 363 U.S. at 582. In the instant case neither the contract language nor the record below supports a finding that the parties have agreed to invest an arbitrator with power to engage in interest arbitration. Indeed, the parties have expressly agreed that no arbitrator shall have the power to make changes in terms and conditions of employment for the parties at the time when such issues normally and routinely arise — at the conclusion

of the contract term.[25] In the absence of a clear and unmistakable agreement of the parties to engage in interest arbitration, this Court should not sanction the adoption of a test which commits employers to waive their statutory right to resolve local issues through collective bargaining merely because they have agreed to be bound by a multiemployer collective bargaining agreement.

III. The Decision Below Undermines the Utility of Multiemployer Bargaining as an Instrument of Labor Peace

Multiemployer bargaining continues "to be the preferred bargaining mechanism in many industries," and is "a vital factor in the effectuation of the national policy of promoting labor peace through strengthened collective bargaining."[26] Multiemployer bargaining promotes labor peace by encouraging "both sides to adopt a flexible attitude during negotiations;" it also enhances the efficiency and effectiveness of the collective bargaining process by permitting the union and employers to concentrate their bargaining resources on the negotiation of a single contract.[27]

It is apparent that the decision below jeopardizes labor peace, as well as the efficiency and effectiveness of multiemployer bargaining. As the district court stated (App. B 7):

> The only way that management could establish policy would be to specifically include it in the agreement, otherwise the policy would be

---

[25] Thus, the agreement expressly excluded from arbitration "any disputes arising out of negotiations of any subsequent agreement" (App. F 23). Moreover, the parties have always resolved disputes identical in all material respects to the one herein through the process of collective bargaining and not through the grievance and arbitration procedure (App. G 1-3).

[26] *Bonanno Linen Service*, 454 U.S. at 410.

[27] *Id.* at 409 n.3, *quoting NLRB v. Charles D. Bonanno Linen Service, Inc.*, 630 F.2d 25, 28 (1st Cir. 1980).

> subject to an arbitrable decision on whether it was "fair, reasonable and practical" to modify it if so requested by the union. *To receive this benefit all the union would need to do is refrain from bargaining or negotiating regarding the policy. It seems to us that this is contrary to the collective bargaining process.* (emphasis added).

To avoid the result so aptly observed by the district court, a single employer member of a multiemployer group would be required to inject local issues into the joint negotiations. However, this action by the single employer would expand the scope of negotiations without any corresponding benefit that serves either the interests of the union or those of the employer members as a whole. As one commentator has observed, the net effect of injecting joint bargaining with considerable time and effort to settle a problem of one employer or a small group "can be a work rule limiting every company instead of solving the problem for one." WM. CHERNICH, COALITION BARGAINING 10 (1969).

The court below recognized that injecting local issues into multiemployer negotiations is not appropriate, and is indeed contrary to national labor policy.[28] The solution, as already

---

[28] In the court's view a union has a legitimate interest in seeking to challenge local policies among those employers with whom it has a dispute without simultaneously being required to challenge that policy among other local employers as to whom represented employees have voiced no complaint. The court quoted with approval the following statement contained in the Union's supplemental brief (App. A 8):

> The exigencies of reaching a settlement will discourage either side from making proposals that are of particular interest to only one employer or to one group of employees. Because problems with this work rule have arisen only at Hostess Cake and employees at other companies might not want their check-in procedure changed, the 'milieu' [citation omitted] in which this contract was negotiated clearly supports the arbitrator's determination that the policy grievance was arbitrable.

In these circumstances, the court concluded that "the policy favoring arbitration espoused in the *Steelworker Trilogy* applies with even greater force in situations involving local disputes governed by multi-employer agreements." *Id.*

demonstrated, *supra*, is individual bargaining either before, during or after the multiemployer negotiations. The solution *is not*, as the court below held, interest arbitration in lieu of any bargaining at all.

Interest arbitration in lieu of bargaining is untenable for the reason that there are "serious limits in the industrial relations arena to the effectiveness of legally imposed terms of employment."[29] A singular danger in substituting the arbitral forum for the bargaining table lies in the "resentment that would arise among workers and employers through [an arbitrator's] lack of understanding and sympathy for major decisions concerning the workplace."[30] That danger is greatly magnified where doubt exists as to whether the parties voluntarily agreed to invest a third party with power to impose terms of employment. "The result is that a party's dissatisfaction with an award may be aggravated by doubts about its legitimacy."[31]

The Company here agreed to participate in bargaining on a multiemployer basis. As part of that Agreement, the Company was bound by a standard grievance-arbitration clause to submit disputes over interpretation and application of the agreement to arbitration. As demonstrated, the fact that the check-in procedure was not reduced to writing and incorporated into the contract did *not* constitute a waiver of the

---

[29] D. BOK AND J. DUNLOP, LABOR AND THE AMERICAN COMMUNITY 238 (1970).

[30] *Id.* Indeed, as Professor Archibald Cox has observed, use of arbitration to resolve disputes over negotiation of contract terms tends to be inflexible:

> [L]itigation is essentially a non-creative process in labor relations. It tends to freeze existing practices and past relations.... The resulting drag upon the mobility and fluidity of the industry would be damaging to the economy.

Id. at 240.

[31] *NLRB v. Columbus Printing Pressmen*, 543 F.2d at 1170.

Company's right to continue the procedure during the term of the contract in the absence of mutual agreement to alter the procedure. The Union here had every opportunity to bargain over the procedure. It never did.

Clearly, the ability to rely on established past practice as the common law of the shop is of vital importance to every employer. Under the decision of the court below, however, an arbitrator acting under the arbitration clause of a multiemployer contract has the authority to disregard established local past practices which are not included in the agreement and may dictate completely new rules under which the parties must live. Accordingly, the only way an employer who bargains on a multiemployer basis may safeguard past practices is by reducing such practices to writing and including them in the collective bargaining agreement. As a practical matter, however, and as this Court has previously recognized, it is virtually impossible to "reduce all of the rules governing a community like an industrial plant to fifteen or even fifty pages."[32] Furthermore, an attempt to incorporate all the past practices of each employer into a multiemployer collective bargaining agreement would be completely antithetical to the basic purpose behind multiemployer bargaining. The decision of the court below thus creates an incentive for employers to bargain on a single employer basis and undermines the utility of multiemployer bargaining as an effective instrument of labor peace.

---

[32] *Steelworkers v. Warrior & Gulf*, 363 U.S. at 579-580, quoting Cox, *supra* p. 10, at 1499.

CONCLUSION

For the foregoing reasons, a writ of certiorari should be issued to review the judgment and opinion of the Court of Appeals for the Sixth Circuit.

GREGORY J. SCHROEDTER
(Counsel of Record)
ROCKFORD R. CHRASTIL
SARA M. GREEN
BELL, BOYD & LLOYD
Three First National Plaza
70 West Madison Street, Suite 3200
Chicago, Illinois 60602
(312) 372-1121

Attorneys for Petitioner

Dated: April 11, 1983

[THIS PAGE INTENTIONALLY LEFT BLANK]